MOHAMMAD YAHYA @ YAHYA BIN LAMPONG

v.

THE RETURNING OFFICER - HO NYUK KONG & ANOR.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN STEVE L.K. SHIM J
[ELECTION PETITION NO. K1 OF 1995]
20 OCTOBER 1995

ELECTION LAW: *Election petition - Refusal of returning oficer to accede to request for recount of votes for lack of jurisdiction - Whether in contravention of reg. 25(13) of the Elections (Conduct of Elections) Regulations 1981 - Whether request for recount pursuant to reg. 25(13)(b) limited to the presiding officer of a polling station - Allegation that counting of votes made in absence of petitioner, his election agent or counting agent - Whether proved - Notice in Form 12A not served as required by reg. 23A(3)(b) - Whether Form 12A to be served personally on candidate or his election agent - Whether results of the election affected - Regulation 30(1) - Allegation that Elections (Conduct of Elections) Regulations 1981 presented to Parliament in violation of s. 17 of Elections Act 1958 - Whether Regulations null and void.*

STATUTORY INTERPRETATION: *"under the supervision of the returning officer" - Regulation 23A(2) of the Elections (Conduct of Elections) Regulations 1981 - Whether to be construed conjunctively with reg. 25(13)(b).*

The election for the Parliamentary Constituency of Marudu P. 146 was held on 24 & 25 April 1995 with two contending candidates i.e. Datuk Yahya Lampong, the petitioner, representing Barisan Nasional and Datu Amir Kahar bin Datu Mustapha, the 2nd respondent, representing Parti Bersatu Sabah. The counting of the votes for the areas of Bangi and Bengkoka was held on 25 April 1995 at the Kudat Community Hall afterwhich the returning officer declared the 2nd respondent the winner by a majority of 114 votes. Being dissatisfied with the results the petitioner filed the present election petition.

According to the evidence of the petitioner's election agent (PW2), as corroborated by the petitioner's legal advisor (PW3), he was at the Kudat Community Hall when the votes were counted although he had not recieved any notice that the counting would be held there. He claimed that the crowd situation was quite chaotic and when he became aware that the petitioner had lost by 114 votes, that is less than 2% of the difference in the total votes cast, he approached the returning officer (RW1) and requested a recount of the votes but was rejected on the ground that the returning officer had no power to do so. Counsel for the petitioner submitted that a request for a recount under reg. 25(13)(b) of the Elections (Conduct of Elections) Regulations

1981 (the Regulations) was not necessarily confined to the presiding officer and that such request could be addressed to the returning officer. Counsel also submitted that having regard to the emphatic words "under the supervision of the returning officer" stated in reg. 23A(2) of the Regulations, the provisions therein must be construed separately from that of reg. 25(13)(b) and to have a double effect, namely, that it was proper to address a request for a recount to the returning officer and that the latter had the power to order a recount. It was further contended that under reg. 23A(3)(b), it was mandatory that a notice in Form 12A had to be personally served on or given to the candidate or his election agent by the Election Commission through its officials. In the alternative, it was submitted that the Regulations were null and void as the procedure adopted in presenting the Regulations before Parliament was in violation of s. 17 of the Elections Act 1958 (the Act) and that therefore the old Regulations, which empowered the returning officer to order a recount of votes, would automatically become operative. In reply, RW1 testified that the votes counted on 25 April 1995 were from 40 polling stations. He described at length the lay out of the Community Hall, the arrangements and procedures adopted in counting the votes and that the results were recorded on the score-board at the Communty Hall. His evidence was undisputed by the petitioner.

Held:

[1] It would appear that the results from the respective polling stations would have been immediately recorded on the score-board after the votes were counted and therefore they would have been known by all those present including PW2 as well as his counting agents. Therefore there would have been more than sufficient time and opportunity for PW2 or his counting agents to request the presiding officers for recount of the votes as soon as the results had been established.

[2] If a request for a recount were to be addressed to the returning officer, a host of physical and human problems might well arise. He would have to order a full recount of all the votes cast and counted in the polling stations which would mean that all the ballot-boxes and attendant documents, etc, sent to him would have to be sent back to the respective polling stations so that the votes could be recounted. Given the circumstances, Parliament in her wisdom has thought fit to confine the matter of the request for a recount to the presiding officer of a particular polling station.

[3] The mere fact that the returning officer has supervision over the counting of votes by the presiding officer does not, *ipso facto* and in the absence of clear and express provisions, confer on the returning officer the power to order a recount nor should he be construed as the proper person to whom the request for a recount has to be addressed. Regulation 23A(2) should be construed conjunctively with reg. 25(13)(b).

[4] Regulation 23A(3)(b) cannot be construed to mean that personal service has to be effected. It is sufficient if the Election Commission through its officials caused a copy of the notice in Form 12A to be served on or given to the candidate (in this case the petitioner) or his election agent. In the present case, the Court accepts the evidence that the returning officer, through his assistant had given notice in Form 12A to one Yong Kong Fah on 19 April 1995; that Yong, although not the appointed election agent of the petitioner, was nevertheless an active member representing the petitioner and that it would be fair to assume that upon receipt of the relevant notices, Yong would have handed them to the election agent or caused copies to be sent to him.

[5] On the evidence as a whole, the petitioner has not established, even on a *prima facie* basis, that his counting agents were not present when the votes cast in the polling stations were counted. On the contrary, there is sufficient evidence to indicate or suggest that they were in fact present at all material times. Thus even if there was failure by the Election Commission to comply strictly with reg. 23A(3)(b) regarding notice to be served, having regard to the circumstances, the election was nevertheless conducted in accordance with the principles laid down by the said provisions and the failure in question did not affect the result of the election. Therefore, reg. 30(1) would apply in this case.

[6] In order to determine whether there was violation of s. 17 of the Act when the Regulations were presented, it would be necessary to call the relevant Parliamentary officials such as the Secretary of Parliament to testify on the steps taken in laying or presenting Regulations of such nature before Parliament. In the absence of such material evidence, it would be unsafe to rely purely on the documents presented to the Court.

[7] Having regard to the evidence, the allegations and propositions raised by the petitioner have no merit and must fail. In the circumstances, the petition is dismissed with cost to be taxed unless otherwise agreed.

[Petition dismissed with costs].

Legislation referred to:

Elections Act 1958, ss. 16, 17

Elections (Conduct of Elections) (Amendment) (No. 2) Regulations 1990

Elections (Conduct of Elections) Regulations 1981, regs. 23A(2), (3)(b), 25(13), (13)(b), 30(1)

Elections Offences Act 1954, ss. 14(1), 32(b)

For the petitioner - Mohd. Shafee bin Abdullah (Ansari Abdullah with him); M/s. Ansari & Co.

For the 1st respondent - Mohammed Bazain Idris, SFC

For the 2nd respondent - Yunof Maringking; M/s. Maringking & Co.

JUDGMENT

Steve L.K. Shim J:

This is an election petition lodged by Datuk Mohd. Yahya @ Yahya bin Lampong (petitioner) against the returning officer Mr. Ho Nyuk Kong (1st respondent) and Datu Amir Kahar bin Datu Mustapha (2nd respondent). The main thrusts of the said election petition can be condensed as follows: (1) that the returning officer's refusal to accede to the request of the petitioner's election agent for a recount of the votes was a contravention of and/or a non-compliance with reg. 25(13) of the Elections (Conduct of Elections) Regulations 1981, promulgated under s. 16 of the Elections Act 1958; (2) that the counting of votes for the polling stations of Mangkubau Laut, SMK Kudut (No. 5), SK Milau and SK Pingan-Pingan was, in each case, done in the absence of the petitioner of his election agent or his counting agent; (3) that for the foregoing reasons, the result of the election for the Parliamentary Constituency of Marudu P. 146 held on 24 April 1995 and 25 April 1995 was affected or might reasonably supposed to have been affected thereby falling within the ambit of s. 32(b) of the Elections Offences Act 1954.

At the outset, it is, I think, necessary to state the undisputed facts, namely, that the election for the Parliamentary Constituency of Marudu P. 146 was held on 24 April 1995 and 25 April 1995; that the 2 contending candidates were Datuk Yahya Lampong (petitioner) representing the Barisan National or BN and Datu Amir Kahar bin Datu Mustapha (2nd respondent) representing Parti Bersatu Sabah or PBS; that the said constituency comprised the areas of Kudat, Banggi and Bengkoka; that counting of the votes for the areas of Banggi and Bengkoka was done on 25 April 1995 at the Kudat Community Hall and that after the conclusion of counting and totalling of the votes, the returning officer had announced and declared that Datu Amir Kahar (2nd respondent) had won by a majority of 114 votes.

Let me start with the petitioner's stand as regards the contravention of and/or the non-compliance with reg. 25(13) of the 1981 Regulations as a result of the conduct of the returning office Mr. Ho Nyuk Kong, the 1st respondent. Here, the petitioner's case turns essentially upon the evidence of Encik Jemud Seboy PW2, the election agent of the petitioner as well as the evidence of Encik Kassim bin Salleh PW3, his legal advisor at the material time. PW2 had testified in effect that on 25 April 1995 he was at the Kudat Community Hall when the votes from the polling stations for the areas of Banggi and Bengkoka were counted although he alleged he had not been served with any notice that counting of such votes was to be held there. According to him, the crowd situation was quite chaotic as there was some difficulty in controlling it. He further testified that at about 9.30 p.m. when he became aware that the petitioner had lost by 114 votes, this being less than 2% of the difference in the total votes cast, he approached the returning officer Mr. Ho Nyuk Kong and requested him for a recount of the votes but this was rejected by the

returning officer who informed PW2 that he had no power to do so. PW2 said he nevertheless persisted in his request to the returning officer and in the process he also spoke to Encik Wan Ahmad, the state election officer through the phone; that in addition, he sought the advice of Encik Kassim Salleh PW3 the petitioner's legal advisor who also spoke to the returning officer and the state election officer about the same matter; that despite all the attempts by him and Encik Kassim Salleh, his requests for a recount were still ignored. He conceded however that although he did ask the returning officer to request the presiding officers to do the recount, he did not at any time personally request the presiding officers or any of them, for a recount. The evidence of PW2 was substantially corroborated by Encik Kassim Salleh PW3 who said that there was a lot of hustle and bustle at the Kudat Community Hall where the counting was in progress. He confirmed that before the final result was announced PW2 had approached him and asked him to request the returning officer for a recount and that he replied he had no *locus standi* to do so. He testified that he nevertheless told PW2 that the latter had the legal right to request a recount either to the presiding officer or the returning officer.

In rebuttal, the returning officer Mr. Ho Nyuk Kong, RW1, testified that the votes counted at the Kudat Community Hall on 25 April 1995 were from 38 polling stations covering the areas of Banggi and Bengkoka as well as 2 of the 27 polling stations for the Kudat area. Mr. Ho went on to describe at some length the lay-out of the said Community Hall and the arrangements and procedures adopted in counting the votes aforesaid. According to him, there were 14 tables (with chairs) arranged in 4 rows, each consisting of 3 tables with 2 additional tables, one for counting the postal votes and the other for his staff; that one presiding officer had been assigned the duty of counting the votes for each of the 38 polling stations for Banggi and Bengkoka, assisted by his counting clerks and witnessed by the counting agents of the candidates concerned. He further testified that the relevant Forms 14 containing records of the results from all the polling stations were submitted to him by the respective presiding officers. He explained that Form 14 would be prepared by the presiding officer on the basis of the results recorded in documents including the tally sheets used by the counting agents and counting clerks and that thereafter this Form 14 duly signed by the presiding officer and the counting agents (if they so wish) would be submitted by the presiding officer to the returning officer who would then add up the results before recording them in the score-board at the Community Hall.

I do not think there is any dispute on the above evidence of the returning officer nor has the petitioner taken issue as regards the following passage in the testimony of RW1 which states:

> The counting was completed by 9.30 p.m. on 25 April 1995. There were altogether 40 presiding officers and their staff doing the counting of votes for Banggi and Bengkoka including 2 for Kudat. They would be concerned with 40

polling stations. One presiding officer would be concerned with one polling station. After the presiding officer had completed counting of the votes for his polling station, the result was not announced through the p.a. system but there was a score-board, a big one, placed on a wall at the right side of the stage. All the names of the polling stations were recorded on this score-board. All the results were also recorded in this score-board.

From this, it would appear that the results from the respective polling stations would have been immediately entered or recorded on the score-board after the votes were counted and therefore quite conceivably they would have been known by all those present in the Community Hall including no doubt Encik Jemud Seboy PW2, the election agent of the petitioner as well as his counting agents. In any event, the results from the respective polling stations would have been known to the petitioner's counting agents assigned to those polling stations immediately after the counting was over and when they compared their tally sheets with those used by the counting clerks concerned. Given this scenario, there would have been more than sufficient time and opportunity for the election agent, in this case PW2 and/or his counting agents to request the presiding officers (if they so minded) for recount of the votes as soon as the results for the polling stations had been established.

Now, it is common ground that before the returning officer Mr. Ho Nyuk Kong announced the final result of the election at the Kudat Community Hall on 25 April 1995, he was approached by the election agent Encik Jemud Seboy who requested him to order a recount but the request was rejected. It would seem that the said request was based on the provisions of reg. 25(13) of the 1981 Regulations, in particular para. (b) thereof which stipulates:

Where:

(a) ... (not relevant).

(b) the difference between the number of votes cast for the leading candidate and the number of votes cast for the next leading candidate is two per centum or less of the total number of votes cast,

then upon the application of either any candidate or of his election agent or counting agent a recount shall be made once only before the presiding officer carry out the proceedings set out in para. (12).

Provided that the presiding officer may in his discretion order a recount or recounts to satisfy himself as to the correct result of the voting.

In this connection, Encik Shafee submitted in effect that any request for a recount under the 2 per centum rule (as he put it) in reg. 25(13)(b), was not necessarily confined or limited to the presiding officer of a particular polling station. He contended that if it were construed as such, it would lead to an absurdity since an unfair final result or a result not truly reflective of the verdict of the people who voted, might arise because, according to him, there would

have been varying disparities in the votes cast for the candidates in the polling stations within the constituency. By implication learned Counsel appeared to suggest that such a request for recount could properly be addressed to the returning officer. I am not convinced of the rationality of such a proposition because, as I see it, there are ready provisions in our election laws allowing for an application to the Court for a recount or scrutiny of all the votes after an election. The question of unfairness therefore does not arise. In any event, it is not inconceivable that if a request for a recount were to be addressed to the returning officer, a host of physical and human problems might well arise. He would have to order a full recount of all the votes cast and counted in all the polling stations which would mean that all the ballot-boxes and attendant documents, etc., sent to him, would have to be sent back to the respective polling stations so that the votes could be recounted. This would also entail the resummoning of all the presiding officers, counting agents, counting clerks, etc., concerned. And where the constituency covered a vast and rugged area hampered with problems of communication (as the Parliamentary Constituency of Marudu P. 146 appeared to have), then it would not be difficult to foresee the immensity of the problems involved, not to mention the enormous expenses required. Given such circumstances, it is, I think, quite understandable why Parliament, in her wisdom, has thought fit and appropriate to confine the matter of the request for a recount to the presiding officer of a particular polling station. For the reasons given, I am unable to accept Encik Shafee's contention aforesaid.

He thereafter sought to rely specifically on the provisions of reg. 23A(2) which stipulates:

> (2) The Election Commission may, if it considers it necessary or expedient in the circumstances of any case, by notice direct that the votes cast by electors at any or all the polling stations in a constituency be counted by the presiding officer of the polling station, under the supervision of the returning officer, at such counting place or places as the Election Commission may specify.

It should perhaps be noted that this proposition was never pleaded in the petition and the petitioner's attempt to amend his petition to include it was disallowed. However, as it related to an issue of law, I had thought it appropriate to allow the matter to be raised in final submissions. In this context, Encik Shafee had submitted somewhat vigorously that the provisions of reg. 23A(2) ought to be looked at separately from those under reg. 25(13)(b). He contended in essence that having regard to the emphatic words "under the supervision of the returning officer" stated therein, the provisions in reg. 23A(2) must be construed to have a double effect, namely, that it was proper to address a request for recount to the returning officer and that the latter had the power to order a recount. With respect, I do not subscribe to that proposition. In my view, the mere fact that the returning officer has supervision over the counting of votes by the presiding officer does not, *ipso facto* and

in the absence of clear and express provisions, confer on the returning officer the power to order a recount nor should he be construed as the proper person to whom the request for a recount has to be addressed. If Parliament had intended such effects, she would have said so clearly and precisely. There is nothing in the provisions of reg. 23A(2) which can be construed that that is the intention of Parliament. I am of the firm view that even in the situation envisaged in reg. 23A(2), any request for a recount has to be directed to the presiding officer of the polling station concerned. This is also consistent with the provisions of reg. 25(13)(b) alluded to. I do not accept Encik Shafee's contention that the provisions of reg. 23A(2) ought to stand alone or that the effect or effects thereof should be considered separately from those under reg. 25(13)(b). I hold the view that reg. 23A(2) should be construed conjunctively with reg. 25(13)(b). They must be read together.

I now come to the petitioner's stand that when the votes cast in the polling stations of Mangkubau Laut, SMK Kudat (No. 5), SK Milau and SK Pingan-Pingan were counted, neither he the petitioner nor his election agent Encik Jemud Seboy or any of his counting agents were present as the relevant notices under reg. 23A(3)(b) of the 1981 regulations were not served on or given to the petitioner or his election agent.

Encik Shafee contended that under the said reg. 23A(3)(b), it was mandatory that a notice in Form 12A had to be personally served on or given to the candidate or his election agent by the Election Commission through its officials. He submitted at length of this. Both the Learned Senior Federal Counsel, Encik Bazain Idris for the 1st respondent and Encik Maringking for the 2nd respondent disputed this construction. Now reg. 23A(3)(b) stipulates as follows:

> (3) The notice under para. (2), which shall be as set out in Form 12A in the First Schedule, shall be made at least three days before the commencement of the poll specifying the situation of the counting place and the date and time of the commencement of the count, and the Election Commission shall:
>
> (a) ... (not relevant)
>
> (b) **cause copy of such notice to be given to each of the candidate or his election agent**.
>
> (c) ... (not relevant).

In my view, the words underscored above are significant. They are clear enough. They cannot be construed to mean that personal service has to be effected. It is sufficient if the Election Commission through its officials caused copy of the notice in Form 12A to be served on or given to the candidate (in this case the petitioner) or his election agent.

As I have stated, the petitioner had alleged in no uncertain terms that his counting agents were not present when the votes cast in the 4 polling stations

mentioned above were done. That being the case, the burden of proof lay with him. There is sufficient evidence to suggest that it was the duty of the election agent to submit the names and addresses of his counting agents to the returning officer and that these counting agents would be specifically assigned by him to the respective polling stations. This is evident in the provisions of s. 14(1), of the Elections offences Act 1954, the relevant part of which states:

> (1) The election agent of a candidate shall appoint every polling agent, counting agent, clerk ... on behalf of the candidate at an election ... and shall before the opening of the poll inform the presiding officer at each polling station in writing of the name and address of the polling agent or agents appointed to act at that station and the returning officer of the constituency or electoral ward concerned in writing of the name and address of the counting agent or agents appointed to attend the counting of the votes.

In the circumstances, it would not be unreasonable to assume that Encik Jemud Seboy would have known the names of those counting agents assigned to the polling stations of the 4 areas in question. If that be the case and having regard to the burden of proof being squarely placed upon the petitioner, it was rather strange that these counting agents should not have been called to give evidence. They would have been material witnesses.

In this case, there is evidence which I accept that the returning officer Mr. Ho Nyuk Kong had, through his assistant, given the notice in Forms 12A to one Yong Kong Fah on 19 April 1995; that Yong, although not the appointed election agent of the petitioner, was nevertheless an active member representing the petitioner in the period just before the April election. It should be noted that it was Yong who handed the appointment letters of the counting agents duly signed by Encik Jemud Seboy to the returning officer. In the circumstances, it would be fair to assume that upon receipt of the relevant notices, he would have handed them to the election agent Encik Jemud Seboy or caused copies thereof to be sent to him. This assumption is all the more conceivable given the fact that Encik Jemud Seboy himself attended the counting of the votes at the Kudat Community Hall although he alleged that someone had in fact told him of the venue of counting. If so, the question could reasonably be posed as to why he did not find it necessary to divulge the name of the informant nor had the petitioner taken any step to call this person to confirm the allegation. In the premises, I have grave doubts as to the truth of his allegation.

There is yet another revelation. Given the undisputed fact that Encik Jemud Seboy was, at all material times, present during the counting of the votes at the Kudat Community Hall on 25 April 1995 and would therefore be in a position to notice whether or not his counting agents were present thereat, he would logically be expected, if they were in fact not present, to have

immediately lodged a complaint about it to the returning officer or to draw the matter to the latter's attention but the evidence clearly indicates that he did not. This is another factor which tends to militate against his credibility as a witness on this issue.

On the evidence as a whole, the petitioner has not established, even on a *prima facie* basis, that his counting agents were not present when the votes cast in the polling stations as alleged were counted. On the contrary, there is sufficient evidence to indicate or suggest that they were in fact present at all material times. This I so hold.

Here, there is ample evidence to indicate that the counting of the votes went on smoothly and, as I have held, it was done in the presence of the counting agents of the candidates concerned. Furthermore, their election agents were also present at the Kudat Community Hall and although there was a big crowd watching the proceedings, there was no untoward incident except perhaps that the crowd was a bit excited and anxious waiting for the final result of the election, which I would have thought, was quite a natural reaction in any tense election. Thus, even if it could be said that there was a failure by the Election Commission to comply strictly with reg. 23A(3)(b) regarding notice to be served either personally or otherwise on the petitioner or his election agent, I am of the view that having regard to the peculiar circumstances enumerated above, the election was nevertheless conducted in accordance with the principles laid down by the said provisions and that the failure in question did not affect the result of the election. Clearly therefore, reg. 30(1) would apply in this case. That regulation states:

> No election shall be invalid by reason of failure to comply with any provision of these regulations relating to elections if it appears that the election was conducted in accordance with the principles laid down in such provisions, and that such failure did not affect the result of the election.

The above provisions are succinct. The respondents who had invoked the provisions of this regulation, would, in my view, be entitled to its protection. This I so hold.

In the course of this hearing, the petitioner through his Counsel, had raised an alternative plea, namely, that the Elections (Conduct of Elections) Regulations 1981, was null and void. There was of course an attempt to amend the petition to include such a plea but the application for amendment was disallowed. Nevertheless, as it pertained to an issue of law, it was raised in final submission. In this connection, Encik Shafee made specific reference to the Elections (Conduct of Elections) (Amendment) (No. 2) Regulations 1990, (which included the new regs. 23A and 25(13) (the said Regulations). He submitted in effect that the procedure adopted by the relevant authorities in laying or presenting the said Regulations before Parliament violated the requirements set out in s. 17 of the Elections Act 1958. He contended that

from the dates appearing in several official documents, it would appear that the said regulations were laid before Parliament only after they had come into operation. According to him, it was a case of "putting the cart before the horse." He then submitted that as a consequence of this procedural *ultra vires* element, the said regulations would be regarded as null and void and therefore the old regulations would automatically become operative and hence, so he argued, the petitioner's case would fall squarely within its provisions because under the old regulations, the returning officer would have the power to order a recount of votes.

Both the learned Senior Federal Counsel and Encik Maringking for the respondents seemed to place a different complexion (if I may use the term) on how the various dates in the official documents referred to by Encik Shafee ought to be construed.

I think that in order to determine the question of whether there was violation of s. 17 when the said Regulations were presented, it would be significant to know fully and precisely the steps to be taken in laying or presenting regulations of such a nature before Parliament. Encik Shafee had described to us briefly the procedure involved but that could hardly be regarded as admissible evidence. It would therefore be necessary to call the relevant Parliamentary officials such as for example the Secretary of Parliament to testify on such matters. In the absence of such material evidence, it would be quite unsafe to rely purely on the documents presented to the Court. In the final analysis, I have to conclude, notwithstanding the vigour with which Encik Shafee had canvassed the issue, that I am not convinced his proposition has sufficient merit. I must reject it accordingly.

In summary therefore having regard to the evidence, facts and the law and for the reasons given, I hold that the allegations and propositions raised by the petitioner have no merit and must fail. It follows therefore that the stand taken by the petitioner that the result of the election for the Parliamentary Constituency of Marudu P. 146 held on 24 and 25 April 1995 was affected or might reasonably be supposed to have been affected must also fail. In the circumstances, I will dismiss the petition with cost to be taxed unless otherwise agreed.